

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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MAR 17 1992

In re Application of)

FOUR JACKS BROADCASTING, INC.)

For a Construction Permit)

Federal Communications Commission
Office of the Secretary

FCC File No. BPCT-910903KE

of the facts. The reply pleading filed by Scripps Howard attempts to address the defective aspects of the original petition with new exhibit material and new arguments. Incredibly, Scripps Howard's Reply is lengthier than its original Petition to Deny. It is well established, however, that a petitioner may not cure a defective pleading by submitting new material with its reply. As the Commission emphasized in Industrial Business Corp., 40 FCC 2d 69 (Rev. Bd. 1973) when it was faced with a petitioner who supplied new material in a reply to an opposition to a petition to enlarge:

A petitioner will not be permitted to attempt to cure an otherwise defective petition where information contained in its reply pleading was readily available and could have been included in the original petition to enlarge issues. To allow the reply to thus serve the purpose of the original petition would be to either (a) effectively render meaningless provisions in the rules for a fair opportunity by another party to respond to allegations or (b) compel the addition of supplementary pleadings not ordinarily contemplated by the rules.

40 FCC 2d at 70. see also East St. Louis Broadcasting Co., Inc., 10 R.R.2d 859 (Rev. Bd. 1967). Thus, any new material contained in the Scripps Howard Reply should be stricken.

II. Four Jacks' Proposed Tower Height Has Been Authorized by the FAA

2. Scripps Howard's pleading wildly casts totally unsupported aspersions on Four Jacks' representations to the Commission. However, Scripps Howard's arguments are belied by the facts. In a footnote, Scripps Howard concedes that "the FAA has given Four Jacks authorization to build to the 1249 foot level" as proposed in the Four Jacks application. Despite this

significant concession, Scripps Howard spends four pages arguing that the height of the supporting structure was falsely represented. Scripps Howard's argument is totally confused and its argument that "a change in height will be required . . . and FAA approval is required" (Reply, p. 5), is simply wrong.

3. The Reply devotes another three pages to a contorted argument that Four Jacks was "required by Section 73.1690(b)(1) of the Commission's rules to notify the FCC" of a 40 foot reduction in the height of its proposed tower when the WBFF antenna was removed from the tower. This argument is fatally flawed. First, Four Jacks is proposing to use the full 1249 feet authorized by the FAA (both currently and at the time the application was filed) and not the lower height. Second and more significantly, Section 73.1690(b)(1) refers to "[a]ny change in the location, overall height of antenna structure, or directional radiation characteristics of a directional antenna system." (Emphasis supplied). See also Bee Broadcasting Associates, 65 R.R.2d 134, 143 ("Section 73.1690(b)(1) refers to any change in the directional radiation characteristics of a directional antenna system"). No directional antenna is involved so the rule is completely inapplicable. The grammatic construction of this rule simply does not support Scripps Howard's argument.

**III. Neither the Facts Nor Commission Case Precedent
Precedent Support Addition of An Issue Concerning
The Structure of The Four Jacks' Tower**

4. Scripps Howard claims that "[t]he report of Matthew J. Vlissides, P.E. [Scripps Howard's consultant] is direct support for Scripps Howard's statement that if the necessary equipment is

added to the tower, it will be rendered unsafe." Scripps Howard then goes on to discuss Mr. Vlissides' "assumptions" and contends that "[t]he assumptions made by Mr. Vlissides were reasonable assumptions." (Reply, p. 9).²

5. Additionally, Scripps Howard contends that the tower "will be rendered unsafe" because "[t]his report [the Vlissides report] has been sent to the Baltimore County Building Engineer, who has contacted Four Jacks and has requested a response by February 28, 1992." (Reply, p. 9). In fact, it was Scripps Howard who sent the Vlissides report to the Baltimore County Building Engineer in a futile attempt to belatedly bolster the argument in its Petition to Deny. However, Scripps Howard's abusive tactic has backfired. Four Jacks has filed a response to the letter it received from the Baltimore County Building Engineer, and he has responded by forwarding a letter stating that he is fully satisfied that the tower complies with Building Code standards. (See Attachment A hereto).

6. In a nearly factually identical scenario, the Commission's Review Board refused to specify a site suitability issue concerning tower structure. See Almardon Inc. of Florida, 13 R.R.2d 91 (Rev. Bd. 1968). In particular, the Review Board noted that the affidavits presented by the petitioner in the case rested on a number of technical "assumptions." The speculative and conclusory allegations advanced by Scripps Howard are no different and the Almardon case is controlling.

2/ In fact, Scripps Howard now relies on further assumptions from Mr. Vlissides presented in a new engineering exhibit. For the reasons set forth in Section I above, this new material must be rejected.

**IV. The Remainder of Scripps Howard's
Technical Arguments Are Also Flawed**

7. Scripps Howard alleges several other purported technical problems but has failed to cite any cases supporting dismissal or denial of the Four Jacks' application on any of the bases alleged. Four Jacks is unaware of any cases dealing with dismissal or denial of an application under Section 73.1030(c) or because an applicant stated it would take responsibility for possible intermodulation interference. Indeed, Scripps Howard is irresponsible and malicious in arguing that "Four Jacks' statement that it will take responsibility for possible intermodulation interference is baseless and unreliable." (Reply, p. 17).

**V. Scripps Howard's Argument With Respect To
The Financial Qualifications of Four Jacks
Is Baseless**

8. Scripps Howard's argument with respect to the financial qualifications of Four Jacks is thoroughly addressed in the Opposition filed by Four Jacks. The Reply merely repeats the initial allegations without acknowledging the Opposition pleading.

**IV. Scripps Howard's Vague and Speculative
Allegations of "Character" Questions
Are Without Merit**

9. Scripps Howard's allegation that there are "character" issues is a vague, totally unsupported argument which does not withstand scrutiny. First, Scripps Howard contends that the Commission should take "official notice" of its records in

connection with the assignment of Station WMAR-TV from Gillett Broadcasting to Scripps Howard because principals of Four Jacks had filed a Petition to Deny the assignment. The petition to deny raised legitimate multiple ownership issues. The simple fact the petition was filed does not raise any character issues as to Four Jacks.

10. Second, Scripps Howard contends that the Commission should take "official notice" of its records in connection with the assignment of license of Station WPTT(TV), Pittsburgh, Pennsylvania, to WPTT, Inc. This argument was not timely raised in the Petition to Deny. In any event, the assignment was approved by the Commission and does not raise any questions as to Four Jacks. Finally, Scripps Howard argues that the Commission should take "official notice" of a pending complaint filed by WNUV-TV 54 Limited Partnership against Sinclair Broadcasting Group, Inc. However, Scripps Howard cites no cases or policies which support taking "official notice" of a pending complaint. Moreover, the complaint relates to a wholly separate matter and does not raise "character issues" as to Four Jacks. The major portion of the "complaint" does not concern Four Jacks. Instead, the complainants seek a declaratory ruling that they (ABRY Communications and Howard Liberman) did not abuse the Commission's processes when they hired a petitioner to deny to file pleadings opposing the assignments of both WPGH(TV), Pittsburgh, Pennsylvania and WPTT(TV), Pittsburgh, Pennsylvania. The remainder of the complaint consists of wholly unsupported allegations and conclusory statements which are belied by the statements of complainants' own principals. Finally, Scripps

Howard has not provided any specificity for its vague allegations, which amount to double or triple hearsay or bare speculation.


VIII. CONCLUSION

Scripps Howard claims that its allegations support dismissal or denial of the Four Jacks application but it has failed to cite any cases which would support outright dismissal or denial even if its allegations had any merit. In fact, the allegations are so conclusory, speculative and untimely that the Reply should be stricken and the Scripps Howard Petition to Deny should be denied.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

By


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ATTACHMENT A

MAR-13-92 FRI 12:26

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P. 02

Baltimore County Government
Department of Permits and Licenses



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March 6, 1992

Mr. Steven A. Thomas, Esq.
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Re: Tower at 1200 North Rolling Road
Four Jacks Broadcasting


Gentlemen:

In response to my letter of February 20, 1992, you submitted

CERTIFICATE OF SERVICE

I, Sybil R. Briggs, do hereby certify that I have this 17th day of March, 1991, mailed by first class United States mail, postage prepaid, copies of the foregoing "RESPONSE TO REPLY OF SCRIPPS HOWARD BROADCASTING COMPANY" to the following:

Donald P. Zeifang, Esq.
Baker & Hostetler
1050 Connecticut Avenue, N.W.,
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Sybil R. Briggs